93-730
No. _____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

IN RE PRISON INDUSTRY AUTHORITY, et al.,

Petitioners.

SUPPLEMENTAL APPENDIX

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On November 3, 1993, the Eastern District denied certification of the appeal from its August 27, 1993 order denying defendants' motion to dismiss. Appendix A; Petition at 7-8. In doing so, the Eastern District appears to have modified its former position that the state "hard labor" statutes were the crucial legal issue. Appendix A at A-2. Instead, the Eastern District stated that Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993), announced an "economic reality" test[1/] which did not foreclose the

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1. It appears that Hale specifically rejects the "economic reality" test as it is commonly understood. Hale v. Arizona, 993 F.2d at 1394. Therefore it is technically incorrect to state that the "economic reality" test, a term of art, is applicable to cases within the Ninth Circuit. In fact, Hale adopts a "totality of the circumstances" test and explicitly rejects the classic "economic reality" test announced in Bonnette v. Calif. Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). Hale v. Arizona, 993 F.2d at 1394-1395.

plaintiff's action in the instant case, Jernigan v. Gomez, No. CIV S-92-1408 GEB PAN. Appendix B at B-6.

DATED: November 9, 1993

Respectfully submitted,

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APPENDIX B

FILED 11/3/93

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

GALVIN BURLESON, et al., Plaintiffs, v. THE STATE OF CALIFORNIA and the PRISON INDUSTRY AUTHORITY, Defendants.	)	CIV S-93-200 GEB PAN ORDER
GARY V. JERNIGAN, et al., Plaintiffs, v. JAMES GOMEZ, et al., Defendants.	)	CIV S-92-1408 GEB PAN

On August 30, 1993, this Court denied Defendants' motion to dismiss Plaintiffs' claims on the ground that Defendants failed to establish a statutory relationship

between Plaintiffs and the California prisons which is analogous to the hard labor requirement in Hale v. State of Arizona, 993 F.2d 1387 (9th Cir. 1993). Plaintiffs also argued that questions of fact existed as to whether their participation in the PIA programs was "voluntary" and thus whether as a matter of "economic reality" was the functional equivalent of "hard labor" referred to in Hale.

Defendants in both cases request certification of the following issue: Does Hale v. Arizona, 993 F.2d 1387 (9th Cir. 1993), bar prison inmates from claiming the minimum wage authorized by the Fair Labor Standards Act (29 U.S.C. § 201 et seq.)? Plaintiffs' counsel in the Jernigan case suggests that this question is inappropriate and that the appropriate question is as follows:

> Are prisoners who perform labor or render services in connection with programs operated and maintained under the authority of California's Prison Industry Authority entitled to payment therefore at the minimum wage rates established under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq.?

Plaintiffs in the Burleson case oppose certification of either question.

ANALYSIS

28 U.S.C. § 1292(b) permits certification of interlocutory appeals if an order presents:

> a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Motions to certify interlocutory appeal are granted only under exceptional circumstances. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475, 98 S.Ct. 2454, 2461 (1978). The Court must find three facts present before granting certification: (1) there must be a controlling question of law, (2) there must be substantial grounds for difference of opinion regarding that controlling legal question, and (3) the Court must determine that an immediate appeal may materially advance the ultimate termination of the litigation. In re Cement Antitrust Litigation, 673 F.2d 1020, 1026 (9th Cir. 1982).

The question for certification posed by Defendants is not appropriate, since Hale expressly found that prisoners are not categorically excluded from the FLSA. Hale at 1392. The Ninth Circuit then decided:

> whether inmates working for a prison, in a program structured by the prison

> pursuant to state law requiring prisoners to work at hard labor, are "employees" of the prison within the meaning of the FLSA.

Id. at 1393. Construing the language of the FLSA in light of the Arizona statute requiring "hard labor," the court held that "whether there is an employment relationship under the FLSA is tested by '"economic reality" rather than "technical concepts."'" Id. at 1393-4 (quoting Goldberg v. Whitaker House Coop., 366 U.S. 28, 33, 81 S.Ct. 933, 936 (1961). Under the "economic reality" test, courts are to:

> consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records.

Bonnette v. California Health and Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). However, the court went on the refine the "economic realities" test for application to the prison inmates in Arizona as follows:

> The case of inmate labor is different from this type of situation whether

> labor is exchanged for wages in a free market. Convicted criminals do not have the right freely to sell their labor and are not protected by the Thirteenth Amendment against involuntary servitude. . . . Under Arizona law, the state "has the authority to require that each able-bodied prisoner . . . engage in hard labor for not less than forty hours per week. . . ."

Hale, 993 F.2d at 1394. The court concluded that as to the plaintiffs in that case:

> the economic reality of the relationship between the worker and the entity for which work was performed lies in the relationship between prison and prisoner. It is penological, not pecuniary. . . . Because prisoners in Hale and Fuller worked for programs structured by the prison pursuant to the state's requirement that prisoners work at hard labor, the economic reality is that their labor belonged to the institution.

Id. at 1395. In these passages and each time the Hale court states its conclusion, it carefully confines the holding to prisoners working at hard labor required by

their incarceration as set forth in Arizona's statutory scheme. Defendants' argued in their motion to dismiss that the holding in Hale barred Plaintiffs' FLSA claim as a matter of law. Since the plain language of Hale provides otherwise, the Court declines to certify this issue. The Defendants' prior motion did not address the question the Jernigan Plaintiffs' propose for certification and therefore the Court did not consider it. Since the question has not yet been presented to the district court it is not appropriate for certification.

The motion to dismiss was denied on the basis that Hale expressly did not hold that a prison/prisoner relationship cannot also be an employer/employee relationship, and Defendants failed to establish that the economic reality of Plaintiffs' labor belonged to the prison institution as was found in Hale. Hale, 993 F.2d at 1395. Because of the narrow issue that was noticed for hearing and briefed by the parties, this ruling does not involve a legal question on which there exists substantial grounds for difference of opinion in the Ninth Circuit. Therefore the motion to certify is denied.

IT IS SO ORDERED.

DATED: October 27, 1993

/s/ Garland E. Burrell

GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE